

Memorandum

To: Cottonwood City Manager, Doug Bartosh; Marianne Jiménez, City Clerk

CC: File

From: Bob Oliphant, Volunteer¹

Date: 4/21/2008

Re: Cottonwood Airpark; **Part I, Relationship of Cottonwood Airpark, Inc., and its successors to the City of Cottonwood (Other memos to follow)**

Purpose of this memo

This memorandum is intended to focus only on the relationship between the City of Cottonwood and Cottonwood Airpark, Inc. (CAP), and its successor corporations. Other memos will follow that detail different aspects of the relationship between tenants, CAP, and the City.

How airport land was acquired

Cottonwood Municipal Airport was formerly known as the Cottonwood/Clemeneau Airport. It was established in the early 1940's and was developed as a military training field for naval cadets during World War II. During this time the airport had a dirt runway that was 3,600 feet in length, a storage and maintenance hangar, and a series of offices.

The airport property was acquired by Yavapai County upon the termination of military training use. In 1962, federal, state, and local monies were used to construct a 3,600 foot paved runway.

The City of Cottonwood incorporated in 1960 and ownership of the airport property was transferred from Yavapai County to the City in 1968. Cottonwood was originally incorporated as a Town. It formally became a City in 1987. The City has operated the airport since 1968, either through Town/City management or through an airport operator's lease agreement.

¹ Robert Oliphant is a volunteer for the City of Cottonwood. No part of this memorandum should be constructed as containing legal advice of any kind. All legal issues and any legal questions must be asked of the City Attorney.

Airport land today; approximate acres per parcel

The land presently owned by the City as a part of its airport/airpark is shown on Exhibit #7 and is encompassed by a red boundary² on a map created in 2006. It appears from this exhibit that the total City-owned land in the airport/airpark is about 240.7 acres. Exhibit #7 also contains numbers for each parcel currently owned by the city, which after some research appear as follow: Parcel 1, 202.6 acres. Parcel 2, 15.1 acres. Parcel 3, 1.7 acres. Parcel 4, 15.3 acres. Parcel 5, .7 of an acres. It is apparently envisioned that at some time in the future the city will purchase parcels numbered 6-9. (Note. I believe that parcel 9 may have been purchased but am not sure at the time of this writing.)

1983 City Council Discussions

In 1983 the City of Cottonwood began discussing how to develop the land it had received from the county years earlier that existed on and around the airport. For example, at its April, 1983 meeting, the City Manager informed the City Council that revised proposals for development of the airport/industrial park were forthcoming.³ At a Special Meeting of the City Council on April 26, Councilman Snyder summarized the negotiations that were ongoing between the City and a private corporation, Cottonwood Airpark, Inc.⁴ On May 10, 1983, the Council agreed by vote to enter into an agreement with Cottonwood Airpark.⁵ A detailed lease was signed by Donald Hahn, the Mayor of Cottonwood, and the president of the Cottonwood Airpark on May 23, 1983.⁶

Creation of a lease agreement – 1983.

On May 5, 1983, an agreement was drafted that was ultimately approved at the May 23 Council meeting between Cottonwood and Cottonwood Airpark, Inc.. The intent of the parties to the agreement appears clear from the language of the lease. The lease states that the parties made the agreement in order to promote “economic development”⁷ and create “new employment opportunities”⁸ for the citizens of Cottonwood. The City as Landlord and CAP as the tenant, stated that they intended to “jointly . . . serve the public interest by providing residents of Cottonwood with access to improved job opportunities on the property.”⁹ As a material part of its obligation to the City, CAP promised to “perform each and all of these terms, covenants and conditions.”¹⁰

² Please see Exhibit #7.

³ Regular meeting of the Cottonwood City Council, April 12, 1983.

⁴ The original incorporation papers for Cottonwood Airpark, Inc. 1983, could not be found on-line with the Arizona Corporate Commission.

⁵ Regular meeting of the Cottonwood City Council, May 10, 1983.

⁶ Exhibit #1, Lease agreement.

⁷ Exhibit #1 1983 Lease agreement, p. 3 (A).

⁸ Ibid.

⁹ Exhibit #1 1983 Lease agreement, p. 3 (D)

¹⁰ Exhibit #1 1983 Lease agreement, p. 3, Section 1, PARTIES. Whenever CAP seeks to have the agreement renewed, it may be useful for the City Manager and the City Attorney to

CAP was provided with the power under the lease to “plan, develop and construct facilities on the property”¹¹ In essence, it appears that Cottonwood was seeking a partner who would take responsibility for the industrial and commercial management and development of most of the land on or around the airport. In return for CAP’s management and development of an industrial/commercial park, the City would encourage development by charging CAP an extraordinarily small amount of rent per acre.¹² One may surmise that the area was reasonably rural at the time and that employment and economic development for the City of Cottonwood was the City’s first, or at least one of its highest, priorities.

The 1983 lease between the City and CAP was apparently not filed with the Yavapai Recorder’s Office. However, notice of the existence of the lease first appears in a document filed January 4, 1984.¹³ Exhibit #2 purports to contain the primary terms of the lease, which are “twenty-five years for Airport Related Areas and for fifty years for all other Tracts, commencing on the Term Commencement Date of December 31, 1983.”¹⁴

The second amendment to the lease, dated March 12, 1985, and filed July 1, 1985, is a technical amendment and states that the background section of the lease agreement is incorporated by reference as a part of the Amendment.¹⁵

Land involved in the lease

The land involved in the 1983 lease encompassed an estimated 140 acres. It is described in the lease as Tracts one through Eight.¹⁶

Lease terms

Although the length of a lease involved in this transaction is sometimes stated as existing for “a hundred years,” the language of the lease actually provides as follows: “Airport-Related Areas¹⁷ may be leased for twenty-five years, and for all of the remainder of the Property is fifty years.”¹⁸

Permission is granted under the provisions of the lease for the City to extend the lease “for Airport-Related Areas for three successive periods of twenty-five years each and the Term

review with CAP whether the intentions of the parties have been, and in the future, will be, carried out.

¹¹ Exhibit #1 1983 Lease agreement, p. 3, (C).

¹² The rental fees and terms relating to the lease are discussed in MEMO #2, which is forthcoming.

¹³ Exhibit #2 titled, “Exhibit 4 to Lease, dated May 23, 1983.”

¹⁴ Exhibit #2.

¹⁵ Exhibit #3 titled, SECOND AMENDMENT TO COTTONWOOD AIRPARK, INC. GROUND LEASE.

¹⁶ Exhibit #1, p. 3, 2(A).

¹⁷ Airport Related areas are defined in Exhibit #1, p. 5 (3)(c)

¹⁸ Exhibit #1, p. 5(3)(A).

for all other areas for two successive periods of twenty five years each.¹⁹ Legal counsel should be consulted regarding the use of the word “may” in terms of requirements for granting extensions.

Creation of Lease Restrictions; Architecture Committee

On March 12, 1985, CAP created a set of restrictions on the use and development of the property. CAP stated that it wanted to subject the property to “certain protective covenants, conditions, restrictions, stipulations, reservations, liens and charges.”²⁰ Among other matters covered in the document was the creation of an Architectural Control Committee.

The restrictions along with the Architecture Committee appear to be in effect as of the writing of this memorandum. However, whether the restrictions have been, and are now being followed, are questions for the City Manager and possibly the City Attorney to explore. A recent visual inspection of some the construction on the west side of Cottonwood Airpark, for example, appears to be in violation of some of the terms.

Creation of Lease Restrictions on some portions of the property – 2007

On March 9, 2007, Kent Backus, Craig Backus, and Judy Backus, created a nonprofit Airport Tenants Association for lots #123 thru #135.²¹ There is no mention of the 1984 restrictions in the document.

The apparent principals involved in creating CAP

At the time it was created, Cottonwood Airpark, Inc. gave as its address the following: P.O. Box 18, Cornville, Arizona 86326. The individuals involved in creating the private corporation were Mr. William Fulkerson, Phoenix, Arizona, Mr. Robert Erven Brown, Scottsdale, Arizona, and Mr. Jack Seitz.

First lease by CAP to a Tenant

In March 1984 Jack Seitz and William Fulkerson set up a new corporation called FMW.²² CAP granted FMW an option to sublease all or any part of Cottonwood Airpark. Between March 15, 1984 and December 31, 1984, FMW paid for the construction of certain “To the Site Improvements” in accordance with a “Water Line Agreement” and made certain other improvements to the property.²³

¹⁹ Exhibit #1, p. 5(c).

²⁰ Exhibit #4, COTTONWOOD AIRPARK DECLARATION OF LEASE RESTRICTIONS, filed January 24, 1985; executed March 12, 1985; retroactive to the First day of March 1984.

²¹ Exhibit #11, COTTONWOOD AIRPARK TRACT ONE Parts B&C.

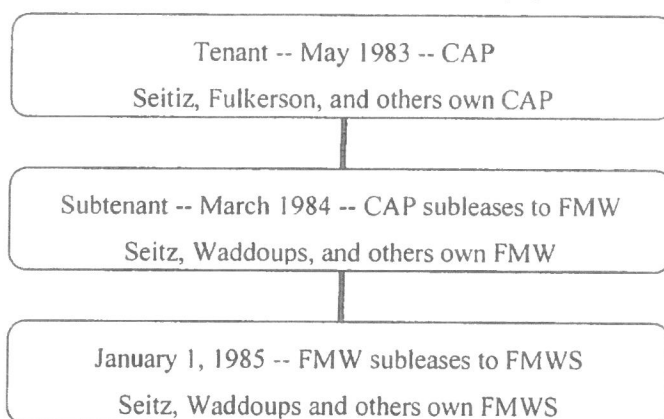
²² Exhibit #5, OPTION TO SUBLEASE DATED January 1, 1985. (The details regarding FMW could not be found.)

²³ Exhibit #5, OPTION TO SUBLEASE DATED January 1, 1985.

By March 27, 1984 Jack Seitz reported to the Cottonwood City Council that all utilities would be in that part of the parcel referred to as the business park.²⁴

January 1, 1985, FMW subleased its rights in the Airpark to FMWS stating that it was making a "capital contribution" to FMWS²⁵ by transferring all its rights to the "Improvements" and "To the Site Improvements."²⁶ The principals involved in this transfer are: C.W. Waddoups, and Jack Seitz.²⁷ The transfer apparently involved approximate 117 acres of land.²⁸

City of Cottonwood – Landlord; CAP to pay Cottonwood Rent for all the land



July 1994 All rights of FMW and FMWS transferred to Cottonwood Airpark 1, L.C. and then to CALC

Recall that back in 1984 CAP has subleased its rights to FMW, and that FMW then subleased all or a portion of its rights to FMWS. Note also that the persons involved in FMW and FMWS were essentially the same. In July 1994 several transfers would occur.

As noted in the next main section, CAP will change its form from Cottonwood Airpark 1, L.C. to Cottonwood Airpark L.C. However, before changing its form, documents were

²⁴ Minutes, Special meeting of Cottonwood City Council, March 27, 1984.

²⁵ Exhibit #5, OPTION TO SUBLEASE DATED January 1, 1985.

²⁶ Exhibit #5, OPTION TO SUBLEASE DATED January 1, 1985

²⁷ Exhibit #5.

²⁸ Exhibit #5, OPTION TO SUBLEASE DATED January 1, 1985, second to last page of Exhibit which reads: "Area of parcel less Exceptions A, B, C and D = 117.0806 Acres more or less."

executed that transferred all of the rights of FMW and FMWS to Cottonwood Airpark 1, L.C.²⁹

It may be of interest to review the list of businesses that the FMWS corporation had subleased property to. The list includes:

General Semi conductor Industries, Inc.

Lot 104 of Tract One subleased to Gayle and Deanne Toomey and J.M.

Gonzales, dba Smelter City Iron Works, Ltd. This lease was cancelled having been bout out with the Smelter City Note dated September 10, 1990 in the amount of \$54,762.62. FMWS possessed all rights to the Note, which is subject to a Midland Loan "as reflected on the books of the Partnership."³⁰

Waste Management of Arizona. FMWS possessed all the rights as the landlord under the sublease and subject to the County Bank Loan.

July 1994 CAP changes corporate form to COTTONWOOD AIRPARK L.C (CALC)

In 1994 CAP altered its legal structure. CAP Quit Claimed all of its right, title and interest in the property leased from the City of Cottonwood to the new limited liability company, Cottonwood Airpark L.C.³¹ (CALC) At some point between 1983 and 1994 Cottonwood Airpark 1, L.C. had been created and the rights held by CAP transferred to Cottonwood Airpark, 1 L.C.³² It is clear that by July 18, 1994, Seitz, Fulkerson, and William Malloy had created a new limited liability corporation (CALC) that was the successor to Cottonwood Airpark, Inc. and Cottonwood Airpark 1, L.C.

The parties involved in the 1994 Arizona limited liability companies remained essentially the same as those involved in CAP, Inc., FMW, FMWS and Cottonwood Airpark 1, L.C., i.e., Jack Seitz, Robert Brown, and William Fulkerson.³³

²⁹ Exhibit 10, Document filed August 18, 1994, effective July 18, 1994 transferring all rights in FMW and FMWS to Cottonwood Airpark 1, L.C.

³⁰ Exhibit 10, p. 2.

³¹ Exhibit #6, QUIT CLAIM DEED FROM COTTONWOOD AIRPARK, INC., an Arizona Corporation, to COTTONWOOD AIRPARK I, LC., an Arizona limited liability company.

³² The corporation records for Cottonwood Airpark, Inc. to Cottonwood Airpark 1, L.C. were not available. The corporate records for Cottonwood Airpark L.C. indicate that the name was changed November 19, 1994 from Cottonwood Airpark 1, L.C. to Cottonwood Airpark L.C. (CALC). See Exhibit #8, Arizona Corporate Commission on-line records showing date name changed.

³³ Exhibit #8, Arizona Corporate Commission on-line records showing incorporation date of July 18, 1994, Cottonwood Airpark L.C.

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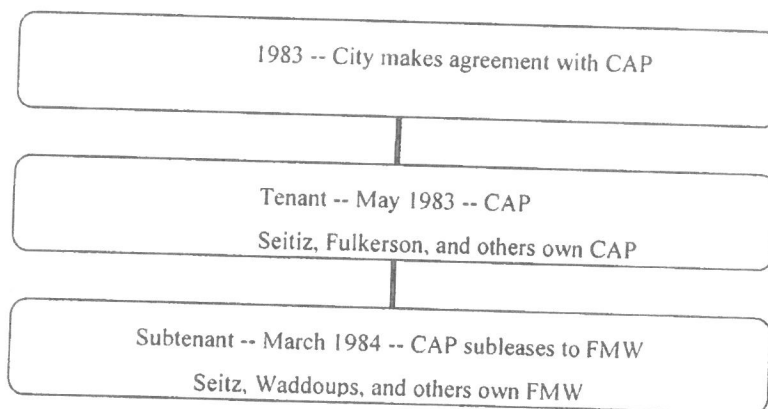
January 2, 2007 Cottonwood Airpark L.C. (CALC) Dissolves

According to documents on file with the Arizona Corporation Commission, Cottonwood Airpark L.C. (CALC) was dissolved on January 2, 2007.³⁴ The named incorporators on the Commission document were: Jack Seitz, William B. Fulkerson, and William Molly.³⁵

To the best of the writer's knowledge, there was no assignment of CALC's rights as the "tenant" under the lease to another corporation. However, and this is important, at various times since 1983, as a subsequent memo will show, CALC assigned all or part of its rights to other entities in Airpark. Note Section 12 of the lease agreement regarding assignment.³⁶

Abandoning Leasehold Estate

It would appear that by dissolving the Cottonwood Airpark L.C. (CALC) without assigning the entire lease to another entity, that the provisions of Section 16 became effective, i.e., by dissolving the corporation it has effectively abandoned the premises.³⁷ This conclusion must, of course, be affirmed by the City Attorney.

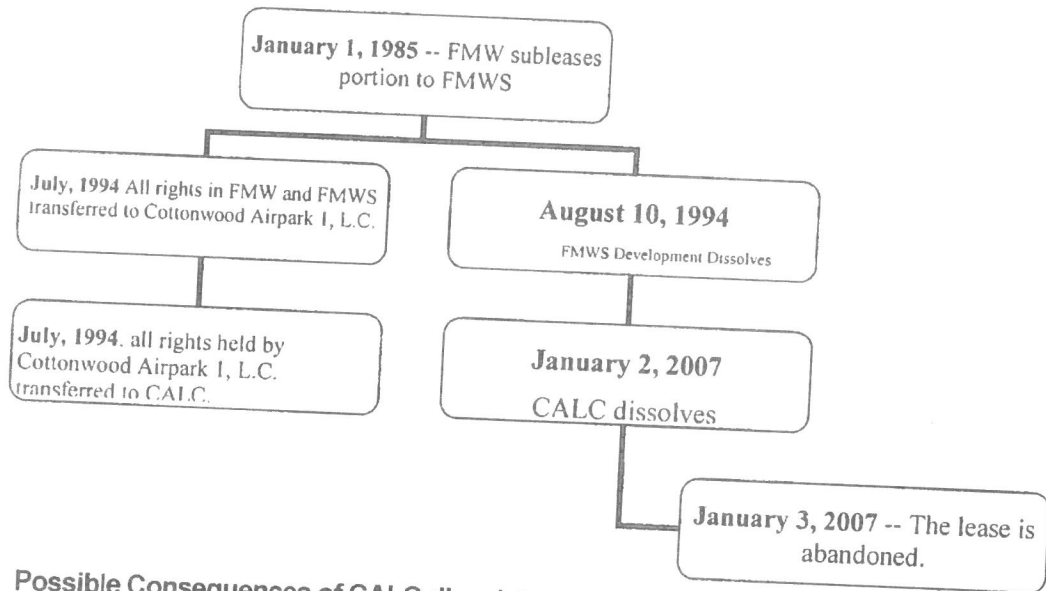


³⁴ Exhibit #8, Arizona Corporation Commission on-line record showing the dissolution of Cottonwood Airpark, L.C.

³⁵ Exhibit #8, Arizona Corporation Commission on-line record showing dissolution effective January 2, 2007.

³⁶ Exhibit #1, p. 13, Section 12.

³⁷ Exhibit #1, p. 16, Section 16.



Possible Consequences of CALC dissolving

Here are a number of observations and questions based upon the fact that CALC was dissolved January 2, 2007. All of the questions and observations should be reviewed by the City Attorney and City Manager for accuracy. The following is not intended as legal advice.

- a. Once CALC dissolved, it appears that there is no longer a "tenant" in the sense of the 1983 agreement.
- b. Once CALC dissolved, the City has responsibility to collect all lease payments from all of the leaseholders to whom CALC and its predecessor corporations subleased property. Does the City have a complete list of the subtenants so it can properly collect the rent?
- c. Does the City have a record of any land that is not currently leased that was encompassed by the 1983 agreement?
- d. Most likely, because the City Council has voted to approve a long list of subtenants over the years, those tenants will argue that they enjoy the terms of the master lease as it existed at the time they made their sublease. That is, they will most likely contend they are entitled to the low yearly rent and the extensions contained in the lease.
- e. Because the City is now landlord and the subtenants have become in reality its "tenants" under the lease, the responsibilities as tenants must be met - at least that should be the City's position. Those responsibilities include promoting "economic development".³⁸

³⁸ Exhibit #1 1983 Lease agreement, p. 3 (A).

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and creating "new employment opportunities"³⁹ for the citizens of Cottonwood. The purpose of the arrangement is for the City as Landlord and the sub lessees as tenants to "jointly . . . serve the public interest by providing residents of Cottonwood with access to improved job opportunities on the property."⁴⁰ As a material part of its obligation to the City, the sub lessee has promised to "perform each and all of these terms, covenants and conditions."⁴¹ Thus, when a sub lessee seeks to renew a lease, the City may require that it provide information showing it is serving the public interest by providing residents with job opportunities.

f. One can anticipate that the sub lessees will try and cherry pick various provisions of the master lease, i.e., they will claim that only certain provisions apply while other provisions do not. Whether they can take this advantageous view is a legal question best left to an opinion by the City Attorney.

g. Note that some of the tenants, such as those associated with Mike Mongini as agent, were given specific instructions in the transfers regarding time-lines for development.

March 26, 2007 Cottonwood Airpark, L.L.C filed with Arizona Corporation Commission

Arizona Corporation Commission records indicate that a new limited liability corporation bearing a name almost identical to that of CALC was filed March 26, 2007.⁴² The parties involved in this limited liability company are: Jonathan P. Aten, Prescott, Teresa Aten, Prescott, and the Aten family trust.

On May 1, 2007, Backus Family Investments, LLC, assigned the rights possessed by it in Lot 127 to Cottonwood Airpark L.L.C. The City of Cottonwood "indicated" its consent⁴³ to the transfer, according to the documents on file with the County Recorder's office. This transaction involved about 8.91 acres. On May 2, 2007, a second recording of this transfer was made.

The assignee on the documents was Jonathan P. Aten on behalf of Cottonwood Airpark LLC.

³⁹ Ibid.

⁴⁰ Exhibit #1 1983 Lease agreement, p. 3 (D)

⁴¹ Exhibit #1 1983 Lease agreement, p. 3, Section 1, PARTIES. Whenever CAP seeks to have the agreement renewed, it may be useful for the City Manager and the City Attorney to review with CAP whether the intentions of the parties have been, and in the future, will be, carried out.

⁴² Exhibit #9, Arizona Corporation Commission on-line record, showing incorporation of the Cottonwood Airpark L.L.C.

⁴³ Exhibit #10, Assignment of Tenant Rights in Cottonwood Airpark, effective May 1, 2007

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Has Cottonwood Airpark LLC replaced Cottonwood Airpark L.C. (CALC)?

The answer to the question appears to be "no." Cottonwood Airpark LLC was incorporated about three months after CALC was dissolved. Therefore, it would appear there can be no relationship. This view must, however, be checked by the City Attorney or an attorney well-versed in real estate matters in Arizona.

This ends this particular memo, which I wrote at the outset, was intended to focus on the major tenant and its responsibilities to the City of Cottonwood.

Initial Suggestions

1. Before granting any extensions, etc., the requestor should submit in writing specific information regarding size of business, number of part-time and full-time employees at present; plans to increase size of hired staff during any extension, and explain how the extension will achieve the original objectives of the project, i.e., to promote "economic development"⁴⁴ and create "new employment opportunities"⁴⁵ for the citizens of Cottonwood..

2. The City should undertake a complete survey of the Airpark property to determine whether any property is left that has not been leased.

Respectfully submitted

Robert E. Oliphant

Volunteer

⁴⁴ Exhibit #1 1983 Lease agreement, p. 3 (A).

⁴⁵ Ibid.